Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

REECE NELSON McCLURE,

Petitioner,

v.

DAVID E. GEORGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should a federal court in North Carolina exercising diversity jurisdiction be required to comply with the substantive law of North Carolina relating to the setting aside of a North Carolina State Court judgment under Rule 60(b) of the North Carolina Rules of Civil Procedure?

II. Should federal courts give "full faith and credit" to the dismissal with prejudice of a case in state court which resulted from voluntary settlement in a court-ordered mediation and which serves as a final judgment?

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Appendix B — Memorandum Opinion And Order Of The United States District Court For The Middle District Of North Carolina Dated And Filed June 5, 2001 And Entered June 6, 2001 ... 3a

Petitioner Reece N. McClure ("Petitioner") respectfully requests that a writ of certiorari be issued to review the judgments of both the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Middle District of North Carolina in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *David E. George v. Reece Nelson McClure* No. 01-1893, is unpublished. (Appendix A). The memorandum opinion and order of the District Court in *David E. George v. Reece Nelson McClure* Civil Number 1:00CV00952 (Middle District of North Carolina, June 5, 2001) is unpublished. (Appendix B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on January 30, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 4, § 1 of the United States Constitution, as supplemented by 28 U.S.C. § 1738:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the

> Effect thereof. U. S. Const., Art. IV, §1. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

A. Underlying Litigation

On February 25, 1994, Respondent filed suit against Petitioner and Robert Bryan Peele in the Superior Court of North Carolina, Forsyth County. (Case No. 94 CvS 1214) (the "State Court" action). The State Court Action claims against Petitioner consisted of a demand for a full accounting for the Reece N. McClure Interior Design partnership, claims of breach of fiduciary duty, fraud, and unfair and deceptive trade practices.

During a court-ordered mediated settlement conference held on March 30 and 31, 1995 in the State Court action, the parties agreed to a settlement. As part of the settlement of the State Court action, a voluntary dismissal with prejudice was filed in State Court on June 20, 1995. (Lodging 1).

B. Summary of the Procedural History of Federal Action

Respondent commenced this proceeding against Petitioner by filing a complaint on September 22, 2000 in the Middle District of North Carolina (the "District Court" action), stating claims for fraud, recision, unjust enrichment, conversion, unfair and deceptive trade practices, breach of

fiduciary duty, constructive trust, and accounting. Jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332(a)(3). Petitioner filed an answer to the complaint together with motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), (2) and (6). Respondent then filed a motion to disqualify Mr. Gregory Wendling as Petitioner's counsel.

On June 5, 2001, the District Court denied Petitioner's motions to dismiss and granted Respondent's motion to disqualify Petitioner's counsel. (Appendix B). Petitioner timely appealed this decision to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit dismissed the appeal for lack of jurisdiction stating that the order was interlocutory and not appealable. (Appendix A).

C. Factual Background

For a number of years prior to 1994, Respondent worked for Petitioner in a North Carolina interior design business known as Reece N. McClure Interior Design. During this time, Respondent claimed to have handled the financial matters for the business, including but not limited to, paying bills and invoicing customers. (Peele deposition, p. 15, lines 18-25, and Resp. District Court Complaint, p. 2, ¶ 7). In 1994, the parties' personal and professional relationship deteriorated, resulting in the filing of a lawsuit. The case, captioned *David E. George v. Reece Nelson McClure and Robert Bryan Peele*, Case No. 94 CvS 1214, was filed in the Superior Court of North Carolina in Forsyth County on February 25, 1994 (the "State Court Action"). The State Court Action claims against Petitioner consisted of a demand for a full accounting for the Reece N. McClure Interior Design

partnership, claims of breach of fiduciary duty, fraud, and unfair and deceptive trade practices. The State Court Action also asserted claims against Robert Bryan Peele, who was involved in the breakup of the personal and professional relationship between McClure and George. Attorney Gregory Wendling represented Petitioner in the State Court Action.

Respondent's State Court Action claims centered on a project awarded to Reece N. McClure Interior Design to redesign and redecorate the home office headquarters of Brown & Williamson in Louisville, Kentucky. Respondent alleged that, at about the same time that Brown & Williamson retained Reece N. McClure Interior Design, Petitioner set up a separate corporation named Environmental Productions, Inc. as a mere vehicle for funneling money from Brown & Williamson.

During a court-ordered mediated settlement conference held on March 30 and 31, 1995, in the State Court Action, the parties agreed to a settlement. The detailed Settlement Agreement and Release of all Claims was signed by David E. George on June 9, 1995 and by Reece McClure on June 15, 1995, more than six weeks after the mediation. (Lodging 2) It states, in pertinent part:

> We hereby declare and represent that the damages we each claim to have sustained are uncertain and indefinite, and in making this settlement agreement and release it is understood and agreed that we are relying upon our own judgment, belief and knowledge of the extent and duration of said damages and have not been influenced to any extent whatever in making this release by any representations or statements regarding said

> conditions or regarding any other matters as made by any person connected with, representing, or represented by any of the parties hereto.

As part of the settlement of the State Court action, a voluntary dismissal with prejudice was filed in State Court on June 19, 1995. (Lodging 1).

Respondent received the following property in settlement of the State Court action: a condominium located at 2689 St. John's Place, Winston Salem, North Carolina valued at $80,000; a 1989 Saab 900 valued at $15,000; an advance payment in cash of $235,000 plus an additional payment in cash of $140,000, for a total settlement value of $470,000. Petitioner and Respondent also agreed to acknowledge that no partnership ever existed between the parties. Following the signing of the Settlement Agreement and Release and the dismissal of the State Court action with prejudice, Petitioner turned over all the above named assets not previously in Respondent's possession, thus completing his obligations under the Settlement Agreement and Release.

In the complaint filed more than four years later in the District Court action, Respondent alleged that he settled the State Court action based on the fraudulent and deceitful representations of Petitioner, his agents and representatives, including his attorney, as to his financial condition and the reputed loss of future economic opportunity. All of the District Court action claims arise out of: (a) allegedly false, fraudulent and untrue representations made by Petitioner and his attorney, Mr. Wendling, during the mediated settlement conference in the State Court Action, and (b) allegedly false affidavits made by Tommy Sandefur and Crawford Sandefur, regarding the Brown & Williamson project and interior design

work performed for their personal residence. Respondent now alleges (contrary to his clear statement in the June 9, 1995 Settlement Agreement and Release that he was not influenced by others in making his decision) that the representations at mediation induced Respondent to settle for a fraction of the actual value of the claims set forth in the State Court Action. In particular, Respondent claims that Petitioner fraudulently misrepresented that the project with Brown & Williamson had been terminated and that he was financially strapped.

REASONS FOR GRANTING THE WRIT

Issues raised in this petition have great significance to this Court and to federal and state jurisprudence. The federal courts exercised jurisdiction over this case on the basis of diversity jurisdiction under 28 U.S.C. § 1332, which would require them to apply the North Carolina substantive state law applicable to the case. *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938) North Carolina substantive law does not allow an independent action to be brought on the basis of the type of fraud alleged, and it would have required Respondent to bring the case (in State Court) as a motion to set aside judgment under North Carolina Rule of Civil Procedure 60(b). *See* N.C. R. Civ. Pro. 60 (b). Neither the federal district court nor the Fourth Circuit Court of Appeals applied this rule. On the contrary, both of the opinions below essentially ignored the existence of a final judgment in the state case, analyzing the case instead as a contractual dispute over a settlement agreement.

Most importantly, by their actions, the courts below set the dangerous precedent that a final judgment in the form of a dismissal with prejudice, when it results from a voluntary settlement after a court-ordered mediation, is not deserving

of the same deference as other final judgments. This treatment raises great concerns for the extensive programs of court-ordered mediation found in both state and federal court systems. As a result of these rulings, unless the Court grants this petition, these mediation programs are in jeopardy, as parties will be reluctant to mediate to settlement if courts do not give the resulting orders the full force of law.

I. The Petition Should Be Granted Because The Opinion Below Allowed An Independent Attack On A Final Judgment, In Clear Contravention Of North Carolina Rule Of Civil Procedure 60(b), Instead Of Granting Full Faith And Credit To That Final Judgment As Required By The United States Constitution.

A. The Opinion Below Allowed An Independent Attack On A Final Judgment, In Clear Contravention Of North Carolina Rule Of Civil Procedure 60(b).

Both the federal District Court and the Court of Appeals erred in their analysis of this case. The analysis both courts used would have been accurate only if this had been a privately negotiated settlement agreement which included a contract clause prohibiting either party from instituting suit against the other in the circumstances described in the settlement agreement. However, this case deals with more than just a privately negotiated settlement agreement with a release of claims and an agreement not to sue. This case was already in litigation, and while mediation was a mandatory part of the court proceeding, settlement was not. In voluntarily settling the case, the parties, with their attorneys, jointly dismissed with prejudice the State Court Action, thus giving the settlement the full effect of law regarding its finality. Both parties entered into the release

and agreed to the dismissal with prejudice more than six weeks after the mediation occurred, giving Respondent ample time to reconsider his decision. However, Respondent did not change his mind and the dismissal with prejudice was filed on June 20, 1995. Under North Carolina law, the dismissal with prejudice constitutes a final judgment in the state court case between Petitioner and Respondent, which must be challenged through Rule 60(b) of the North Carolina Rules of Civil Procedure. *Caswell Realty Associates I, L.P. v. Andrews Company, Inc.*, 121 N.C. App. 483, 466 S.E.2d 310 (1996).

1. Under North Carolina Law, The Dismissal With Prejudice In The State Court Case Was A Final Judgment.

There is a significant difference in the eyes of North Carolina courts between a privately negotiated agreement not to sue, the breach of which would nullify the contractual right to avoid a lawsuit, and the dismissal of a pending suit with prejudice, which legally ends an already pending lawsuit. North Carolina courts have stated that "A dismissal with prejudice is an adjudication on the merits and has res judicata implications." *Caswell Realty Associates, I, L.P v. Andrews Company Inc.*, 128 N.C. App. 719, 496 S.E.2d 607 (1998) ("*Caswell II*") citing *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 306 S.E.2d 513 (1983) and, *Barnes v. McGee*, 21 N.C. App. 287, 290, 204 S.E.2d 203, 205 (1974).

As discussed in Petitioner's appellant brief to the Fourth Circuit Court of Appeals (P. App. Brief, p. 9), the two *Caswell* appellate court decisions cited in this Petition provide virtually an identical scenario to the instant case. In the *Caswell* cases, the parties had earlier filed suit over a breach

of contract for two commercial leases. The parties negotiated a settlement and agreed to a Stipulation of Dismissal with Prejudice with regard to dispute on one lease. The dismissal with prejudice was entered, but, subsequently, the plaintiff alleged fraud on the basis of misrepresentation of financial condition. The plaintiff first filed and then dismissed a Rule 60(b) motion; then, in the first *Caswell* suit, *Caswell Realty Associates I, L.P. v. Andrews Company, Inc.*, 121 N.C. App. 483, 466 S.E.2d 310 (1996) ("*Caswell I*") filed an independent action challenging the agreement on the basis of fraud, negligent misrepresentation and unfair and deceptive trade practices. The District Court granted summary judgment for the defendants.

The North Carolina Court of Appeals affirmed the District Court in *Caswell I*, stating that "It is settled in this and most other jurisdictions that plaintiff cannot recover damages for fraud 'unless and until the judgment denying him the right to recover is vacated.'." *Caswell Realty Associates I, L.P. v. Andrews Company, Inc.*,121 N.C. App. at 486, 466 S.E.2d at 312, citing *Gillikin v. Springle*, 254 N.C. 240, 244; 118 S.E.2d 611, 614 (1961) The court further found that, because the fraud alleged was intrinsic, the Statute of Limitations barred the plaintiff from filing another motion to set aside judgment under Rule 60(b). *Caswell Realty Associates I, L.P. v. Andrews Company, Inc.*,121 N.C. App. at 487, 466 S.E.2d at 313. The North Carolina Supreme Court then affirmed the *Caswell I* decision. *Caswell Realty Associates I, L.P. v. Andrews Company, Inc.*, 343 N.C. 304, 471 S.E.2d 68 (1996).

In *Caswell II*, *Caswell Realty Associates, I, L.P v. Andrews Company Inc.*, 128 N.C. App. 719, 496 S.E.2d 607,

(1998), a suit over the second commercial lease which was not part of the dismissal with prejudice, but which arose from the same set of facts and issues, the court granted summary judgment for the defendants on the basis of res judicata, finding that "... in accordance with previous caselaw, the voluntary dismissal with prejudice was a final adjudication on the merits...." *Caswell Realty Associates, I, L.P v. Andrews Company Inc.*, 128 N.C. App. at 719, 496 S.E.2d at 611.

Respondent's filing of the suit in federal district court was clearly an attack on a final judgment, regardless of the genesis of that final judgment. Respondent could only have attacked that final judgment through a Rule 60(b) motion to set aside judgment in the state court. N.C. R. Civ. Pro. 60(b). "It is settled law that a judgment which is regular and valid on its face may be set aside only by motion in the original case in the court in which the judgment was rendered." *Jeffreys v. Snipes*, 45 N.C. App. 76, 262 S.E.2d 290 (1980), citing *Hassell v. Wilson*, 44 N.C. App. 434, 261 S.E.2d 227 (1980). "Such a judgment may not be attacked collaterally. Neither may a direct attack be maintained in an independent action." *Jeffreys*, 45 N.C. App. at 78, 262 S.E.2d. at 291. By not acknowledging the significance of the dismissal with prejudice, the District Court did not give this case the res judicata protection it would receive from North Carolina courts, and the 4th Circuit Court of Appeals followed the District Court's lead.[1]

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1. The Fourth Circuit's per curiam opinion (Appendix A) did not review the issue of res judicata in this case and chose to dismiss for lack of jurisdiction because the order was interlocutory. As shown in this Petition, the order was not interlocutory because of the res judicata effect of the State Court dismissal with prejudice, and thus, the Fourth Circuit should have reviewed the case as a final judgment and reversed the District Court's decision.

2. North Carolina Rule Of Civil Procedure 60(b) Sets Forth The Remedy For Challenging A Final Judgment Based on Allegations of Fraud.

When Respondent filed his complaint in federal district court, Respondent admittedly had a procedure by which he could have challenged the state court judgment. (Resp. App. Brief, p. 27). North Carolina courts have provided a mechanism for challenging final judgments as a result of allegations of fraud. Rule 60(b) of the North Carolina Rules of Civil Procedure states, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> * * *
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> * * *
>
> The motion must be made within a reasonable time and [for reason (3)] not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. N.C.R. Civ. Pro. 60 (b).

In *Stokley v. Stokley*, 30 N.C. App. 351, 227 S.E.2d 131 (1976), the North Carolina Court of Appeals discussed the

test for determining whether alleged fraud was viewed as intrinsic or extrinsic. The court stated:

> The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time of appeal or other direct attack has expired only if the alleged fraud is extrinsic rather than intrinsic. Fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party to an action has been prevented from fully participating therein there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation, has had the opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. Fraud perpetrated under such circumstances is intrinsic, *even though the unsuccessful party does not avail himself of his opportunity to appear before the court*. (Emphasis added). *See also, Textile Fabricators, Inc. v. C.R.C. Industries, Inc.*, 43 N.C. App. 530, 259 S.E.2d. 570 (1979).

a. The Type Of Fraud Alleged In This Case Is Clearly Intrinsic Fraud And Not Fraud On The Court.

In the instant case, any alleged fraud on the part of Petitioner clearly falls into the intrinsic category. Respondent received proper notice of the State Court Action since he initiated that action. Respondent had the opportunity for full

discovery, including the opportunity to depose Bryan Peele (who was named as a co-defendant in that case, and on whose later bogus testimony Respondent is apparently basing his entire federal court case).

Respondent was represented by counsel at every stage of the process, including the court-ordered mediation, and was fully informed that there was no obligation to settle the case at that mediation. According to Respondent's own statements and those of Bryan Peele, Respondent had access to and control of the financial records of Reece McClure Interior Design, since he was responsible for billing and receiving payment from clients (Peele deposition, p. 15, lines 18-25, and Resp. District Court Complaint, p. 2, ¶ 7).

Respondent's claim of fraud is based solely on the allegedly false statements of Petitioner and his attorney at the mediation and the allegedly false affidavits of two key witnesses. All of these allegations are vehemently denied; however, even if true, the allegations would be allegations of reliance on false testimony, which North Carolina courts view as intrinsic, rather than extrinsic, fraud. Therefore, under Rule 60(b), Respondent's challenge had to be filed in State Court, and within the stated one year time period. *Stokley v. Stokley*, 30 N.C. App. 351, 227 S.E.2d 131 (1976) (widow denied right to challenge divorce decree on the basis of false testimony because it constituted intrinsic fraud and the statutory time for challenge had already run); *Textile Fabricators, Inc. v. C.R.C. Industries, Inc.*, 43 N.C. App. 530, 259 S.E.2d. 570 (1979) (independent challenge in state court to a final judgment in federal court denied because the court stated that the fraudulent false testimony alleged would constitute intrinsic fraud and thus, it could not be brought in an independent action); *Caswell Realty Associates, I, L.P v.*

Andrews Company Inc., 128 N.C. App. 719, 496 S.E.2d 607, (1998) (see discussion infra); *Jeffreys v. Snipes*, 45 N.C. App. 76, 262 S.E.2d 290 (1980) (executor of will denied right to challenge final judgment on basis of fraud by surviving spouse and attorney-in fact because the fraud alleged was intrinsic fraud and attempted challenge was not brought as a motion in the case, but instead as an independent action); *Horne v. Edwards*, 215 N.C, 622, 3 S.E.2d 1 (1939). Even the Respondent acknowledged in his brief before the Fourth Circuit Court of Appeals that the court-ordered mediation was a part of the court proceedings which, if true, even more clearly puts the allegation of fraud into the intrinsic category. (Resp. App. Brief, p. 30.)

b. The Final Judgment Could Only Have Been Challenged By A Motion To Set Aside Judgment Under North Carolina Rule Of Civil Procedure 60(b).

As shown above, the final judgment in the State Court Action could only have been challenged by a Motion to Set Aside Judgment under North Carolina Rule of Civil Procedure 60(b), and not by an independent action in another court system. The District Court and Fourth Circuit erred in failing to acknowledge the final judgment nature of the case, instead reviewing the action strictly on the basis of the settlement agreement. This dispute was ended not by contract, but by the authority of the court, and could be undone only by the authority of that same court. *Jeffreys*, 45 N.C. App. 76, 262 S.E.2d. 290. This was not merely a privately negotiated agreement not to litigate the issue; it was an absolute right on the basis of the doctrine of res judicata because the dismissal with prejudice filed in that case stands as a final judgment. *Caswell*, 128 N.C. App. 719, 496 S.E.2d 607.

Though in the Fourth Circuit Respondent attempted to categorize the alleged fraud as "fraud on the court," he provided no basis for that statement. (Resp. App. Brief, p. 11) Indeed, there is no basis for the statement, as no North Carolina court has ever recognized the type of fraud Respondent is alleging as "fraud on the court." The federal courts should have applied North Carolina substantive law to the issue and, had they done so, they would have resolved the issue in Petitioner's favor.[2]

Respondent has also asserted a argument that the District Court action included separate, independent claims to be considered. However, those claims were all part of the initial State Court Action and were, thus, subsumed within the dismissal with prejudice. In *Caswell I*, the court addressed this issue and concluded that none of the additional causes of action could be considered unless the dismissal with prejudice was vacated. *Caswell Realty Associates I, L.P. v. Andrews Company, Inc.*, 121 N.C. App. at 486, 466 S.E.2d at 312. Therefore, Respondent is precluded under North Carolina law from pursuing these actions without an order setting aside judgment under Rule 60(b). N.C. R. Civ. Pro. 60(b).

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2. Federal Rule of Civil Procedure 60(b) is very similar to North Carolina's rule, but case law in federal cases has interpreted the definition of "fraud" somewhat differently. We do not address that difference here because, since this is a diversity case, North Carolina caselaw is the controlling law in this case, and, as shown in the discussion, it would clearly view this type of fraud as intrinsic.

B. The Opinion Below Did Not Grant Full Faith And Credit To The North Carolina State Court Decision As Required By Article 4, Section 1 Of The United States Constitution.

Article 4, § 1 of the United States Constitution requires federal courts to give full faith and credit to the "public Acts, Records, and judicial Proceedings of every other State." 28 U.S.C. § 1783 extends that obligation to "every court within the United States and its Territories and Possessions . . ." In *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S. Ct. 892 (1984), this Court held that full faith and credit requires that a federal court apply the doctrine of res judicata to a state court judgment. In *Migra,* this court barred a plaintiff from bringing a claim in federal court under 28 U.S.C. § 1983 after a state court case on the same issue had been resolved. This Court held that "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *See also Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982); *Haring v. Prosise*, 462 U.S. 306, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983). This Court went a step further in *Migra* in identifying this obligation as a Congressional mandate.

> Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-

> court judgments whenever the courts of the State from which the judgments emerged would do so. . . .

Migra, 465 U.S. at 81, 104 S. Ct. at 896, citing *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

In this case, the opposite has happened. Even if all facts asserted by Respondent are taken to be true, a North Carolina state court would have considered the allegations to be intrinsic fraud, and thus, the case would have been dismissed on the grounds that the Respondent failed to move to set aside the judgment under Rule 60(b) within one year. Instead of granting full faith and credit to the final judgment of the state court, the federal district court chose to treat the case as a "privately negotiated right not to be sued" and to ignore the legal significance of the final judgment in the case. This is not full faith and credit, but instead a complete ignoring of the authority of the state court. A state court would never have allowed an independent action in this case and Respondent should not be allowed to make this "end run" around justice by "court-shopping."

II. The Petition Should Be Granted Because This Case Addresses An Important Public Policy Question Of Whether To Grant Equal Deference To Final Judgments Derived From Voluntary Settlement And Dismissal With Prejudice As A Result Of Court-ordered Mediation As Compared To Other Types Of Final Judgments.

A. Failure By Federal Courts To Give A Dismissal With Prejudice Resulting From a Court-Ordered Mediation Settlement The Same Level Of Deference As Other Final Judgments Will Undermine The Success Of State Court-Ordered Mediation Programs.

Court ordered mediation has become a standard in almost every federal and state court in the United States. "Mediation and Conference Programs in the Federal Court of Appeals", Niemic, Robert J., Federal Judicial Center 1997; "Report on Trends in the State Courts, 1999-2000 Edition," National Center for State Courts and State Justice Institute. Supporters laud its efficiency in eliminating unnecessary litigation. The system in North Carolina, which began as an experiment in 1991, was put into formal effect in 1995. N.C. Gen. Statutes § 7A-38.1. Mediation has become an institutionalized part of litigation in North Carolina, and, acting under the Mediated Settlement Conference Program, North Carolina courts require it in most cases. Statistics show that the number of cases resolved by mediation has grown 30 percent since 1996 and that, generally, of the cases referred for mediation, most either settled before the mediation or as a result of the mediation. Report of the NC Dispute Resolution Commission Fiscal Years 1996/1997, 1997/1998, 1998/1999, 1999/2000, and 2000/2001.

In this case, mediation was mandated by the court. Both parties were represented by counsel, and both parties knew that they were under no obligation to settle. Indeed the settlement release was not signed, nor was judgment entered until almost six weeks after the mediation, giving the parties ample time to rethink their decisions. If final judgments resulting from mediation settlements are not given the same level of deference as other final judgments, no litigant will feel comfortable that any case is ended through settlement, and as such will be reluctant to settle under court-ordered mediation.[3]

Additionally, in North Carolina, an advisory opinion issued by the North Carolina Dispute Resolution Committee orders North Carolina mediators not to testify even if all parties to the mediation agree to such testimony. Advisory Opinion Number 03-01 of the North Carolina Dispute Resolution Commission. Respondent bases his federal court case on the testimony and records of one witness, Bryan Peele, whose testimony in his deposition is in direct opposition to responses made to his attorney at the time of the original State Court Action. At the time of the State Court Action, Peele might have been an objective party, but since that time, Peele has lost a lawsuit against Petitioner in which lawsuit his allegations against McClure were very similar to those made by Respondent in the State Court Action. *Peele v. McClure and Environmental Productions, Inc.* CV97-6503-AIJ (U.S. Dist. Ct. Central Dist of California, 1999). In addition, Peele was joined as a defendant in the State Court

3. Interestingly, in this case Respondent never mentions that he received assets totaling nearly half a million dollars as part of the mediation and dismissal with prejudice. Respondent has enjoyed the use of these assets for over five years and yet is claiming that the settlement should be declared void because of fraud.

Action but not in the district court suit as he certainly should have been since he, by his own admission, was an integral part of the alleged conspiracy. Obviously, Peele is not an objective witness, nor, frankly, is anyone else involved in the suit. The only person who could objectively testify to what was said at the mediation is the mediator and, under North Carolina rules, he is not permitted to testify.

CONCLUSION

This case raises important questions concerning the grant of full faith and credit to state court final judgments and the deference paid to final judgments resulting from court-ordered mediated settlements. North Carolina substantive law does not allow an independent action to be brought on the basis of the type of fraud alleged. The federal District Court's failure to apply this rule (and the Fourth Circuit Court of Appeals' failure to correct this error) has resulted in Petitioner's having to defend a case which should have been barred by res judicata.

The courts below also set the dangerous precedent that a final judgment in the form of a dismissal with prejudice, when it results from a voluntary settlement after a court-ordered mediation, is not deserving of the same deference as other final judgments. This treatment raises great concerns for the extensive programs of court-ordered mediation found in both state and federal court systems, as parties will be reluctant to mediate to settlement if courts do not give the resulting orders the full force of law. By granting this petition, the Court can correct the errors of both the District Court and the Fourth Circuit Court of Appeals in failing to follow this Court's rulings regarding the granting of full faith and credit to state court decisions, and also correct the dangerous

presumption that dismissals with prejudice resulting from court-ordered mediation settlements are not worthy of the same level of respects as other final judgments.

Accordingly, Petitioner Reece N. McClure respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED JANUARY 30, 2002

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1893

DAVID E. GEORGE,

Plaintiff - Appellee,

versus

REECE NELSON MCCLURE,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Frank W. Bullock, Jr., District Judge. (CA-00-952-1).

Submitted: December 17, 2001 Decided January 30, 2002

Before WIDENER, LUTTIG, and MICHAEL, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Amiel J. Rossabi, FORMAN, ROSSABI, BLACK, MARTH, IDDINGS & SLAUGHTER, P.A., Greensboro, North Carolina, for Appellant. Ellis B. Drew, III, WELLS, JENKINS, LUCAS & JENKINS, Winston-Salem, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

Appendix A

PER CURIAM:

Reece Nelson McClure appeals the district court's order denying his motion to dismiss David E. George's civil action against McClure. We dismiss the appeal for lack of jurisdiction because the order is not appealable. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (1994), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (1994); Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The order here appealed is neither a final order nor an appealable interlocutory or collateral order.

We dismiss the appeal as interlocutory. Further, we deny McClure's request for a writ of mandamus as he has not met the heavy burden of showing he has no other adequate means to attain relief and that his entitlement to such relief is clear and indisputable. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). We also deny George's request, set forth in his brief, that we tax McClure with the costs of this appeal, George's costs, and George's attorneys' fees, without prejudice to his right to pursue such relief pursuant to the procedures established by Rules 38 and 39 of the Federal Rules of Appellate Procedure. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA DATED AND FILED JUNE 5, 2001 AND ENTERED JUNE 6, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CIVIL NO. 1:00CV00952

DAVID E. GEORGE,

Plaintiff,

v.

REECE NELSON MCCLURE,

Defendant.

MEMORANDUM OPINION

BULLOCK, District Judge

This matter is before the court on Defendant Reece Nelson McClure's motion to dismiss Plaintiff David E. George's complaint. Plaintiff alleges claims for relief based on fraud, rescission, unjust enrichment, conversion, unfair and deceptive trade practices, breach of fiduciary duty, constructive trust, and accounting. Plaintiff's motion to disqualify Defendant's counsel is also before the court. For the following reasons, Defendant's motion to dismiss will be denied and Plaintiff's motion to disqualify Defendant's counsel will be granted.

Appendix B

FACTS

Because this matter is before the court on a motion to dismiss, the Plaintiff's version of the facts contained in the complaint will be taken as true despite Defendant's denial of many of Plaintiff's assertions. Plaintiff and Defendant were partners in an interior design business, Reece N. McClure Interior Design. Plaintiff and Defendant shared responsibilities for design decisions and the operation of the business. The business thrived and began receiving commercial design projects which were especially profitable. In the middle of 1992 and early 1993 Thomas Sandefur, Chief Executive Officer of Brown & Williamson Tobacco Company, consulted with Plaintiff and Defendant regarding a redesign and redecoration of the Brown & Williamson home headquarters in Louisville, Kentucky. The initial projected cost for the first phase of the project, the executive 26th floor, was $2,000,000.00. A deposit was received by Plaintiff on April 24, 1993, for $1,000,000.00 and was placed in Reece N. McClure Interior Design's account in Winston-Salem, North Carolina.

About this time, Defendant formed a new corporation called Environmental Productions, Inc. Plaintiff believes that this corporation is a sham corporation used in part to defraud Plaintiff by serving as a receptacle for payments funneled from the Brown & Williamson job. At this point, the personal relationship between Plaintiff and Defendant began to deteriorate and Defendant allegedly began siphoning partnership funds. Defendant became involved with Brian Peele, who allegedly participated in the scheme to defraud Plaintiff.

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Plaintiff subsequently brought suit against McClure and Peele in Forsyth County Superior Court designated as *David E. George v. Reece Nelson McClure and Robert Brian Peele, 94CvS 1214* (hereinafter the "Lawsuit"). On November 3, 1994, Sandefur and his wife, Crawford Sandefur, filed affidavits in the Lawsuit stating that the Brown & Williamson job had been terminated and that Environmental Productions, Inc., had been hired to finish limited work on the 26th floor. In November 1994, Defendant testified in a video deposition for that case that the Brown & Williamson project had been cancelled.

All three parties to the Lawsuit met for a mediated settlement conference at which time Defendant allegedly represented the following facts: (1) the Brown & Williamson job had been cancelled; (2) Environmental Productions, Inc., was going to finish the job, greatly reduced in scope, realizing no profits; (3) after the small amount of work left for Brown & Williamson was completed, there would be no further work or economic opportunity with the Brown & Williamson project; (4) McClure had no money, the $1,000,000.00 deposit for the Brown & Williamson job and over $1,000,000.00 of accumulated shared assets had been spent; (5) Plaintiff should immediately settle the Lawsuit for a small amount because that was all Defendant could pay; if Plaintiff did not settle at this time there may be no money in the future, and Plaintiff might even have to help refund monies paid by Brown & Williamson; and (6) the mediated settlement agreement had to state that no partnership ever existed for Defendant's tax purposes only.

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Plaintiff claims that he believed these representations at the time they were made, in part because he had witnessed lavish spending by Defendant and Peele. Plaintiff now claims that the Sandefurs' affidavits were false and that McClure's attorney in the Lawsuit, the same attorney representing Defendant in the present case, knew that he was procuring false affidavits. Plaintiff claims that he relied on these false statements when he entered the settlement agreement.

Subsequently, Plaintiff discovered that Defendant's statements as well as those made by the Sandefurs and Defendant's attorney were false. The Brown & Williamson project had not been cancelled and Defendant reaped millions of dollars in profits from that job. Apparently, as with Plaintiff and Defendant, Peele's relationship with Defendant had deteriorated. Plaintiff learned that Peele had filed a lawsuit against McClure in California. Through discovery Peele obtained financial documents allegedly showing that McClure had received millions of dollars from Brown & Williamson after testifying in his deposition for the Lawsuit that the project was cancelled. Peele also provided a sworn statement detailing the fraudulent scheme in which Defendant enlisted Peele to participate.

As a result of Plaintiff's discoveries regarding the alleged false representations made at the settlement conference for the Lawsuit, upon which Plaintiff relied in entering the settlement, Plaintiff has brought this action.

Appendix B

DISCUSSION

Defendant has moved for dismissal of Plaintiff's claims pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), and (6). Although both parties have attached voluminous documents to their briefs, the court will limit its review to the pleadings because this matter is before the court on a motion to dismiss. Also before the court is Plaintiff's motion to disqualify Defendant's counsel.

The burden of proving subject matter jurisdiction is on the plaintiff. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). Under Rule 12 (b) (1), the moving party "should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* Plaintiff alleges that this court has proper subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiff contends that he is a resident of North Carolina and that Defendant is a resident of Florida and that the amount in controversy exceeds $75,000.00. Defendant concedes diversity of the parties but argues that "the claim does not *in good faith* meet the jurisdictional [sic] required $75,000.00 because Plaintiff does not have a claim whatsoever presented 'in good faith.' " (Def.'s Br. in Support of Mot. to Dismiss at 5). Clearly the jurisdictional fact of the amount in controversy is in dispute. Because Plaintiff claims damages of over $75,000.00 on numerous counts and alleges facts that provide a basis for millions of dollars in damages, Plaintiff has satisfied the jurisdictional amount required in a diversity case under 28 U.S.C. § 1332, and this court has proper subject matter jurisdiction.

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To determine whether the court has personal jurisdiction over Defendant pursuant to Federal Rule of Civil Procedure 12(b)(2), the court must conduct a two-part inquiry. First, it must be determined whether the statutes of North Carolina permit the exercise of jurisdiction and, second, whether exercising jurisdiction over Defendant violates due process of law. *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062, 1064 (4th Cir. 1982). The North Carolina long-arm statute specifically provides that North Carolina jurisdiction is proper when a party has contracted to deliver within North Carolina something of value to the plaintiff. N.C. Gen. Stat. § 1-75.4(5)(c). The North Carolina long-arm statute should be given a liberal construction providing North Carolina courts the full jurisdictional power permitted under federal due process.[1] N.C. Gen. Stat. § 1-75.4; *Vishay*, 696 F.2d at 1065; *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629, 630 (1977).

It is well settled that a non-resident defendant must have sufficient "minimum contacts" with the forum state for a court to exercise personal jurisdiction over that defendant in accordance with due process of law. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Defendant argues that these minimum contacts are lacking because the fact that he is president and sole shareholder of a North Carolina corporation is not sufficient to satisfy notions of fair play and substantial justice. He also contends that North Carolina lacks an interest and notes the "bogus nature of Plaintiff's

1. Defendant does not contest that the North Carolina long-arm statute permits the exercise of jurisdiction. Defendant argues instead that he does not have sufficient minimum contacts with North Carolina to satisfy due process considerations.

Complaint." Defendant does not address the fact that the gravamen of this case is fraud perpetrated in the mediated settlement agreement in connection with a lawsuit in a North Carolina court. Defendant was a resident of North Carolina for over twenty-five years. The underlying Lawsuit was based on business transactions entered into by Defendant's North Carolina business. Most of the alleged fraudulent statements were made in North Carolina. The settlement agreement was entered in North Carolina. It does not offend notions of fair play and substantial justice to exercise jurisdiction over a non-resident when that person allegedly made misrepresentations in this state in connection with a lawsuit in this state. Defendant has sufficient minimum contacts with North Carolina for this court to exercise personal jurisdiction in accordance with due process of law.

Dismissal under Rule 12(b)(6) is improper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In considering a motion to dismiss, the court accepts as true all well-pleaded allegations and views the complaint in the light most favorable to the plaintiff. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). " 'The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.' " *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir. 1989) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

The facts in this case are contentiously disputed even at this early stage. Defendant has provided extensive

documentation of the Lawsuit that goes far beyond the scope of a motion to dismiss. Defendant essentially argues that Plaintiff does not state a claim upon which relief may be granted because (1) the mediated settlement agreement contains a general release and a clause that states that the parties were not relying on representations made in connection with reaching the settlement, (2) the Lawsuit was voluntarily dismissed with prejudice, (3) the statute of limitations has expired for Plaintiff's claims, and (4) Plaintiff cannot show reasonable reliance.

The fact that the mediated settlement agreement contains a general release and a clause that states that the parties were not relying on representations made in connection with reaching the settlement does not bar an action brought on grounds of fraud in the inducement. A settlement agreement is in essence a contract, and as such requires a meeting of the minds. If a settlement agreement is procured by fraud the requisite meeting of the minds is absent. *See Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 911-12 (1998). Despite Defendant's argument to the contrary, "the parol evidence rule does not . . . preclude admission of extrinsic evidence when one of the parties seeks to prove that a written agreement was executed under circumstances amounting to fraud." *Cunningham v. Brown*, 51 N.C. App. 264, 270, 276 S.E.2d 718, 724 (1981).

Further, "a release is subject to avoidance by a showing that its execution resulted from fraud or mutual mistake." *Sykes v. Keiltex Indus., Inc.*, 123 N.C. App. 482, 485, 473 S.E.2d 341, 344 (1996) (citing *Cunningham v. Brown*, 51 N.C. App. at 269, 26 S.E.2d at 723). As a general principle,

"fraud destroys the validity of everything into which it enters, and . . . vitiates the most solemn contracts, documents, and even judgments." 37 Am. Jur. 2d Fraud and Deceit § 8 (1968). Plaintiff's complaint properly states a claim for fraud. The complaint alleges with specificity the statements upon which Plaintiff relied, that these alleged false representations were made with intent to deceive Plaintiff, and that Plaintiff reasonably relied on these misrepresentations.

The three-year statute of limitations for an action grounded in fraud does not run until the party bringing the action is aware of the fraud or should have been aware of the fraud. *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 7, 149 S.E.2d 570, 575 (1966). This is a factual determination that is not appropriate to rule on at this time. Likewise, Plaintiff clearly pleads reliance on alleged misrepresentations made with regard to the settlement agreement. (Compl. ¶¶ 21-24, 37-41, 43). Whether Plaintiff did in fact rely on these statements and whether such reliance was reasonable are questions of fact. *See Massey v. Duke Univ.*, 130 N.C. App. 461, 466, 503 S.E.2d 155, 159 (1998).

Because this action will not be dismissed on Defendant's motion, it next must be determined if Defendant's counsel should be disqualified. "Disqualification is a serious matter which cannot be based on imagined scenarios of conflict, and the moving party has a high standard of proof to meet in order to prove that counsel should be disqualified." *Plant Genetic Sys., N.V. v. Ciba Seeds*, 933 F. Supp. 514, 517 (M.D.N.C. 1996). The Fourth Circuit has cautioned against overly mechanical application of disciplinary canons at the

expense of litigants' rights to choose their counsel. *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 146 (4th Cir.), *cert. denied*, 506 U.S. 1021 (1992). In a close case, however, the court should resolve all doubts in favor of disqualification. *Rogers v Pittston Co.*, 800 F. Supp. 350, 353 (W.D. Va. 1992), *aff'd*, 996 F.2d 1212 (4th Cir. 1993).

Defendant's counsel in the present action, Gregory A. Wendling, was also Defendant's counsel in the Lawsuit that resulted in the disputed settlement agreement. Wendling was involved in the settlement process and allegedly was aware of misrepresentations made by others and made misrepresentations himself in that context. According to the North Carolina Revised Rules of Professional Conduct, "If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." Rule 1.7, comment 6. Rule 3.7 of the North Carolina Revised Rules of Professional Conduct also provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> > (1) the testimony relates to an uncontested issue;
> >
> > (2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

Wendling will most likely be a material witness regarding the issues at the heart of this action given the allegations of his participation in the Lawsuit and the resulting settlement agreement. Discovery has not commenced, and a pretrial conference has not yet been scheduled. The issues in this case are not such that Wendling is the only attorney competent to proceed in this action. Therefore, disqualification is not prejudicial to Defendant.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss will be denied and Plaintiff's motion to disqualify Defendant's counsel will be granted.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

s/ [illegible]
June 5, 2001 United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CIVIL NO. 1:00CV00952

DAVID E . GEORGE,

Plaintiff,

v.

REECE NELSON MCCLURE,

Defendant.

ORDER

BULLOCK, District Judge

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED that Defendant's motion to dismiss [Doc. #8] is DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion to disqualify Defendant's counsel (Doc. #14] is GRANTED, and Defendant's counsel Gregory A. Wendling is disqualified to represent Defendant in this civil action. Defendant shall have thirty (30) days following the date of this order to have new counsel enter an appearance in this case or to notify the court that he is electing to proceed *pro se*. The Clerk shall

thereafter schedule a prompt Rule 26(f), Federal Rules of Civil Procedure, conference. All discovery is STAYED until the Rule 26(f) conference.

s/ [illegible]
United States District Judge

June 5, 2001